APPENDIX.

In the Court of Appeals of Franklin County, Ohio.

Ralph Rea, Plaintiff-Appellee, vs. Margaret Fornan, et al., Defendants-Appellants.	No. 3295, No. 3300, No. 3301, No. 3302.

Journal Entry.

This cause came on to be heard de novo upon the separate appeals upon question of law and fact, perfected by Raymond W. Kilbourne, as executor of the will of Grace D. Murnan (No. 3295), by Lawrence H., Fred, Frank L., Charles W., Joseph T., James and Edward McDonough and Anne Alpin (No. 3300), by Margaret Fallon Lunn (No. 3301); and by James Devanney (No. 3302), to the final orders, finding of fact, decree and judgment of the Court of Common Pleas of Franklin county, Ohio, in Cause No. 154482 in said court, and was submitted upon the pleadings filed in the Court of Common Pleas, upon the testimony taken therein, in accordance with the stipulation of the parties approved by the court, produced in the Common Pleas Court and supplemented by the testimony of witnesses taken as upon depositions in this court and exhibits, and upon oral arguments and briefs of counsel.

The above numbered causes of action having been considered as one proceeding, it is hereby on motion of the court ordered that all of the foregoing causes, to wit: 3295, 3300, 3301 and 3302 are hereby consolidated to one

cause and to be hereafter known as Cause No. 3295 on the dockets of this court.

And the majority of the court, namely, Geiger, P. J., and Barnes, J., being duly advised in the premises and after due consideration, rendered its written opinion, finding the issues in favor of said Raymond W. Kilbourne, executor, and said other defendant-appellants, and against Ralph Rea, plaintiff-appellee, Mary Meyer cross-petitioner herein, and other blood relations of Maurice P. Murnan, defendant-appellees herein.

And thereupon and thereafter said Ralph Rea and other appellees and Mary Meyer filed applications for rehearings and motions for new trial with requests for separate findings of fact and conclusions of law; and thereafter, as provided by Rule IX of this court; prepared and submitted their findings of fact, which, together with the objections and suggestions of appellants, were submitted to the court. After due consideration thereof, the majority of the court, namely, Geiger, P. J., and Barnes, J., overrules both said applications for a rehearing and said motions for a new trial, **but modifies its former findings of fact herein, and finds as its facts the following:** (Emphasis ours.)

1. That Maurice P. Murnan died on or about May 12, 1937, intestate and seized of the seventeen parcels or tracts of real property described in plaintiff's petition, to which reference is made.

2. That said Maurice P. Murnan died intestate leaving his widow, Grace Murnan, surviving him and that said parties had no children born to them.

3. That the personal property in the state of Maurice P. Murnan is sufficient to pay all debts and claims against said estate.

4. That the nearest blood relations, but not next of kin, of the said Maurice P. Murnan are the persons named as such in plaintiff's petition, to which reference is made, except that Clara Collins named therein has since died, leaving as her only next of kin the defendants, Margaret Fornan and Mary Martin; and that the correct name of the defendant, Margaret Fornan, is Margaret M. Catcher.

5. That on March 17, 1922, said Maurice P. Murnan by deed then delivered conveyance to Grace Daugherty (Backenstoe) Murnan the real estate described in the cross-petition of Mary Meyer herein, to which cross-petition reference is made.

6. That as the surviving spouse and sole heir of said Maurice P. Murnan, the said Grace D. Murnan acquired under the statute of descent and distribution the title in fee simple to the seventeen parcels of land described in the petition herein, **and of which she had possession from the date of his death on May 12, 1937, to the date of her death on November 16, 1939.** (Emphasis ours.)

7. That after the death of said Grace D. Murnan, Raymond W. Kilbourne was duly appointed and qualified as the executor of her estate, and filed his answer therein to the cross-petition of Mary Meyer.

8. That since the death of said Grace D. Murnan, said Raymond W. Kilbourne, first as executor of the estate of said Grace D. Murnan and later as receiver duly appointed by the Common Pleas Court in this cause, has had the possession of the seventeen parcels of real estate described in the petition herein and collected the rents and profits therefrom until deprived of the possession thereof by the final decree and judgment of the Common Pleas Court in this cause, from which decree and judg-

ment the several appeals herein were perfected to this court.

The following are findings in relation to the marriage between Maurice P. Murnan and Grace (Daugherty) Backenstoe Murnan:

9. That on and prior to July 15, 1915, said Maurice P. Murnan was a single man, his former wife having died in February, 1913, and Grace Daugherty (Murnan) was a single woman, having been divorced from her former husband, George Backenstoe, in November of 1912.

10. That in 1912, Grace Daugherty Backenstoe was the wife of George Backenstoe, and in August of said year filed an action against him for divorce in the Insolvency Court of Cuyahoga county, Ohio, wherein service was had against the defendant, George Backenstoe, by publication, and affidavit for publication now in the files having been executed by her attorney as notary; and thereafter the cause was heard by Judge Addams of said Insolvency Court and a judgment and decree entered by him, finding service by publication upon the defendant, jurisdiction of the parties and subject matter, and that the plaintiff should be and was thereby divorced from the defendant, George Backenstoe, and restored to her maiden name of Grace Daugherty.

11. That thereafter no direct attack was made upon said decree, and no indirect attack, except in the evidence, but not by the pleadings, of this cause after it was brought into this court; and said divorce is therefore valid and binding and the same Grace Daugherty was a single woman thereafter, until married to Maurice P. Murnan.

12. That the laws of Arizona in force and effect in 1915 were as follows:

"Section 3830. All regularly licensed or ordained clergymen, judges of courts of record and all justices of the peace of the several counties are authorized to solemnize the rites of matrimony between all persons legally authorized to marry."

"Section 3833. No persons shall be joined in marriage within this state until a license shall have been obtained for that purpose from the clerk of the Superior Court of the county in which one of the parties reside, or in which the marriage is to take place."

"Section 3834. Any person desirous of marrying shall apply to the clerk of the Superior Court and shall receive from him a license directed to the persons, authorized by law to solemnize the rites of matrimony which shall be sufficient authority for any one of such persons to solemnize such marriage."

"Section 3836. The clerk of the Superior Court shall record all licenses issued by him as provided in this chapter in a well bound book kept for that purpose, and it shall also be the duty of the persons solemnizing the rites of matrimony to endorse the same on the license and make return of the same to the office of the clerk of the Superior Court within twenty days after the solemnization as aforesaid, which return shall also be recorded in a well bound book kept by the clerk of the Superior Court for that purpose."

"Section 3842. Every marriage ceremony must be performed in the presence of the officiating clergyman, judge or justice of the peace and at least two witnesses of lawful age, and a certificate evidence of such marriage must be signed by at least two such witnesses."

"Section 3844. The common law that a marriage may be contracted by agreement of the parties without marriage ceremony is hereby abrogated and no marriage contracted within this state shall be valid unless a license be issued as provided in this chapter, and a marriage solemnized by one of the persons

authorized by law or by some one purporting to act in the capacity of a clergyman, judge or justice and believed in good faith, by at least one of the parties, to be such."

"Section 1762. When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the parties against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent."

Said Section 1762 of the Revised Statute of 1913 appears in substantially the same form in Section 23-316 of the Arizona Code of 1939, which was compiled with annotations under the supervision of the members of the Supreme Court of Arizona, as follows:

"Section 23-316. Marriage Certificates—Oral Proof of Marriage—* * * When the marriage is to be proved, evidence of the admission of such fact by the adverse party or of general repute, or of cohabitation as married persons, or any other evidence from which the fact may be inferred, shall be competent."

Notes to Decision.

"Common Law Rule. Statute is simply declaratory of the rule of evidence at common law. In re: Terry's Estate, 58 Min., 268, 59 N. W., 1013."

"Marriage. In prosecution for bigamy, evidence is admissible to prove the first marriage by witnesses that the marriage was performed in a foreign country by one, apparently an officer, and that the parties lived together in various places as husband and wife. Ford v. State, 21 Ariz., 567, 192 Sec. 1117."

13. The marriage records in the Supreme Court for Coconino county, Arizona, fail to show that any marriage license was ever issued to Pat Murnan, or Grace Daugh-

erty. There is no record of said marriage in the office of the clerk of the Superior Court of said Coconino county, but the absence of said record may be accounted for by the failure of the justice or the parties to return the license and a certificate of the solemnization of the marriage to the said clerk of courts, or the failure of the clerk to make a record thereof, upon the return of said license.

14. That the fact of said ceremonial marriage is corroborated from the date thereof by repeated statements and admissions of the said Maurice P. Murnan, as well as of said Grace D. Murnan, as to said marriage in Arizona to close friends and associates, by their conduct and constant association together, and by the reputation of the marriage among their friends and associates following July, 1915; and after August, 1919, when they purchased and went to live at Graceland, the large show place on North High street, by their general reputation as man and wife, their constant declarations of their marriage, their deeds and conveyances as man and wife, their recognition of mutual interests in each other's property and by all their conduct until the death of Maurice P. Murnan on May 12, 1937.

15. Pat Murnan and Grace Backenstoe Murnan were well known underworld characters in Columbus, Ohio, and continuous law violators. Pat Murnan was the leading gambler and Grace Backenstoe Murnan the madam of a well established sporting house. The relations between these parties prior to July, 1915, were meretricious. The expressed desire of said parties to avoid any public declaration of their marriage and the giving of deeds in their single names from July, 1915, until her house of ill fame was closed in August, 1917, and while she lived at said house until August, 1919, was for the well au-

thenticated reason that the association of her house in the public mind with his name would affect the taxicab business in which he was engaged.

16. That said Grace D. Murnan remained the wife of said Maurice P. Murnan until his death intestate on May 12, 1937, and as his surviving spouse was his sole heir to the seventeen parcels of land described in the petition herein, of which she had possession until her death on November 16, 1939.

17. That the plaintiff and the other distant blood relations of said Maurice P. Murnan, as set forth in plaintiff's petition, have no interest in the seventeen parcels of real estate described in said petition, and are not entitled to the decree of partition as prayed for in said petition.

18. That to sustain the foregoing findings of fact, viz: that Maurice P. Murnan and Grace Backenstoe Murnan were husband and wife at the time of the decease of Maurice P. Murnan.

Geiger, P. J., finds that a common law marriage existed between the parties after 1919, established by their open assumption of the relation of husband and wife followed by cohabitation as such and were so treated and reputed in the community and circle in which they moved, which relation continued until the time of the death of Maurice P. Murnan and that this establishes a common law marriage between the parties, but might well corroborate a ceremonial marriage.

That Barnes, J., finds that on or about July 15, 1915, a marriage license was duly issued to said Maurice P. Murnan and Grace Daugherty (Backenstoe) by the clerk of the Superior Court of Coconino county at Flagstaff, and the marriage contract was entered into by said

parties and the marriage was solemnized by the justice of the peace in and for said county at Flagstaff, Arizona, that there was one witness to said marriage.

That Hornbeck, J., finds that an analysis of the essentials of proof will not permit of the determination that Grace Backenstoe and Pat Murnan were married in any form recognized in the law.

And as its conclusions of law, the court finds that:

1. The plaintiff-appellee and other blood relations, defendant-appellees of Maurice P. Murnan, were not his heirs at law, have no interest in the seventeen parcels of real estate described in the petition, or in any of them, and are not entitled to the partition thereof.

2. Maurice P. Murnan at his death was not the owner of the real estate described in the cross-petition of Mary Meyer, and said cross-petitioner has no right to the partition of said real estate.

3. Grace D. Murnan became vested, as surviving widow and sole heir, with the title of the seventeen parcels described in the petition, and to this title in each parcel her heirs and/or devisees have succeeded, and are entitled to be restored to the possession of which they were deprived by the judgment of the Common Pleas Court herein appealed from.

4. The plaintiff-appellee and Mary Meyer, the cross-petitioner, are not entitled to an accounting for the rents and profits of said real estate from the estate of Grace D. Murnan, or from Raymond Kilbourne, the executor thereof, and are not entitled to the rents and profits therefrom which came into the hands of said Raymond W. Kilbourne as receiver; but all of said rents and profits belong to the estate and heirs of Grace D. Murnan.

5. The burden of proof is at all times upon the plaintiff-appellee and the defendants-appellees to establish their right to partition.

It is therefore ordered, adjudged and decreed upon the finding of fact by the Honorable Frank W. Geiger, P. J., that a marriage existed between said Maurice P. Murnan and Grace Backenstoe, that the majority of the court, namely, Geiger, P. J., and Barnes, J., find that at the death of Maurice P. Murnan, the said parties were husband and wife, to which finding of fact, His Honor, Judge Hornbeck, dissents; that the petition of the plaintiff-appellee and the cross-petition of Mary Meyer be, and the same are hereby dismissed; that the defendant-appellants and other heirs and/or devisees of the said Grace D. Murnan be restored to the possession of the seventeen parcels of real estate described in the petition, of which they were deprived by the judgment of the Common Pleas Court herein, and that they have an accounting for all the rents and profits of which they were deprived by said judgment appealed from. It is further ordered that the defendant-appellants herein recover their costs herein expended, taxed at $..... And this cause is remanded to the Common Pleas Court for further proceedings according to law and the findings hereinabove set forth.

To each and all of which the plaintiff-appellee and other defendant-appellees and Mary Meyer excepted and still except.

Frank W. Geiger, P. J.,
J. D. Barnes, J.,
Roscoe W. Hornbeck, J.

(Filed and entered June 6, 1942.)

the Honorable J. D. Barnes, J., of this Court and of